Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	

COMPETITIVE UNIVERSAL SERVICE COALITION COMMENTS ON THE JOINT BOARD RECOMMENDED DECISION ON THE TENTH CIRCUIT REMAND

COMPETITIVE UNIVERSAL
SERVICE COALITION

Michele C. Farquhar
David L. Sieradzki
HOGAN & HARTSON, LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-6400

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The Competitive Universal Service Coalition ("CUSC") hereby submits its initial comments on the Joint Board's *Recommended Decision* on the issues from the *Ninth Report and Order* that were remanded to the Commission by the U.S. Court of Appeals for the Tenth Circuit. 1/

INTRODUCTION AND SUMMARY

CUSC commends the Joint Board for its efforts to address the difficult public policy issues remanded by the court. Nonetheless, CUSC respectfully urges the Commission *not* to adopt the *Recommended Decision*'s proposed new state certification requirement relating to rate comparability. This recommendation, if adopted, could harm consumers in high-cost areas by inhibiting the development of

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1/ *Federal-State Joint Board on Universal Service*, Recommended Decision, 17 FCC Rcd 20716 (Jt. Bd. 2002) ("*Recommended Decision*"). *See also Federal-State Joint Board on Universal Service*, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432 (1999) ("*Ninth Report and Order*"), *remanded*, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001); *Comment Sought on the Recommended Decision of the Federal-State Joint Board on Universal Service Regarding the Non-Rural High-Cost Support Mechanism*, Public Notice, 67 Fed. Reg. 71121 (Nov. 29, 2002).

innovative rate plans and technologies, and is inconsistent with the fundamental universal service principle of competitive neutrality. Moreover, this and other proposals in the *Recommended Decision* do not adequately address the concerns expressed by the Tenth Circuit. The Commission should also avoid adopting vague policies such the opportunity for states to seek additional support discussed in the *Recommended Decision*, which do not satisfy the statutory criterion of providing support that is "predictable" and transparent. Instead, the Commission should work with the states to develop universal service policy reforms that more effectively preserve and advance universal service, and ensure that all support is explicit, portable, and competitively neutral.

I. THE COMMISSION SHOULD NOT ADOPT THE "RATE COMPARABILITY" CERTIFICATION PROPOSAL IN THE *RECOMMENDED DECISION*.

The most significant new proposal in the *Recommended Decision* is "to require states to certify that the basic service rates in high-cost areas served by eligible telecommunications carriers (ETCs) within the state are reasonably comparable to a national rate benchmark." 2/ The *Recommended Decision* does not propose any substantive changes to the existing high-cost system to more effectively achieve the Commission's goals or that would induce states to do the same. 3/

2/ *Recommended Decision*, ¶ 50. *See generally id.* at ¶¶ 50-56 for a description of the proposal.

3/ Indeed, the *Recommended Decision* specifically disavows any attempt "to conduct a comprehensive review of the high-cost support mechanisms for rural and non-rural carriers as a whole to ensure that both mechanisms function efficiently and in a coordinated fashion," *id.* at ¶ 28, thereby declining to address one of the most critical issues remanded by the Tenth Circuit. *Qwest Corp. v. FCC*, 258 F.3d at 1204-05.

Rather, the *Recommended Decision* proposes to retain the status quo but to require states to issue a statement certifying that they are maintaining "comparable" intrastate rates, based on a complex national benchmark analysis. The Commission should decline to adopt this rate comparability certification proposal, because it could harm consumers in high-cost areas, fails to comply with the established requirement of competitive neutrality, and would not effectively address the Tenth Circuit's concerns.

A. The Proposed Rate Comparability Certification Requirement Would Restrict Innovative Service Offerings and Harm Consumers in High-Cost Areas.

The rate comparability certification proposal in the *Recommended Decision* could have the effect of limiting the availability of innovative and diverse service packages to consumers in high-cost areas, thereby harming those consumers. The proposal apparently was designed with incumbent local exchange carriers ("ILECs") in mind: it presupposes a world in which all ETCs are subject to pervasive rate-regulation by state commissions, so that state commissions can control rate levels and can periodically "certify" to the FCC how they are exercising that rate-regulation authority. 4/ The proposal thus completely ignores the existence of competitive ETCs, the vast majority of which are not regulated by state commissions, and some of which – commercial mobile radio service ("CMRS") carriers whose offerings include the services supported by the universal service

4/ *See, e.g., Recommended Decision*, ¶ 53 ("The Joint Board recognizes and supports the role of state commissions in setting rates within each state.").

program – are statutorily exempt from rate regulation by state commissions under most circumstances. 5/

Moreover, the *Recommended Decision*'s rate comparability certification proposal presumes that all ETCs offer residential customers a more or less uniform "basic service" package for which a standardized "basic service rate template" can easily be developed to facilitate rate comparisons. 6/ This presumption is false. As early as 1997, the Commission anticipated that consumers would benefit from offerings that combine the services specified for universal service support with other features. The Commission recognized that such diverse offerings would enable "consumers [to] choose to receive service from the carrier that offers the service package that best suits the consumer's needs," and rejected certain ILECs' proposals to require all ETCs to offer the designated services on an "unbundled" basis – *i.e.*, in the standard format traditionally offered by ILECs. 7/

The Commission's pro-competitive vision of a proliferation of different types of service packages, which include but are not limited to universal service-supported features, is starting to be realized in the marketplace. Competitive ETCs, including wireline competitive local exchange carriers ("CLECs") as well as CMRS carriers, frequently offer consumers a selection of service packages that include the

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5/ 47 U.S.C. § 332(c)(3).

6/ *Recommended Decision*, ¶ 54.

7/ *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, 8824, ¶ 86 (1997) ("*Universal Service First Report and Order*"), *subsequent history omitted.*

basic services supported by universal service program, but that also may include other features, including long distance calling packages, mobility and roaming features, Internet and other information services, and other features. In the near future, ILECs may also begin offering consumers such diverse service packages, especially as the Bell operating companies obtain authority under Section 271 of the Act to offer long-distance services. 8/ Indeed, the Commission recently recognized the significance of the proliferation of diverse, bundled service packages to universal service policy. 9/

Yet the *Recommended Decision*'s rate comparability certification proposal is oblivious to these developments, which confer tremendous benefits upon consumers. Instead, the *Recommended Decision* would require a state certification process that, in effect, would lock in pre-existing monopoly ILEC "basic service rate template" rate structures subject to state-regulated rates. 10/ Indeed, state commissions might view the certification requirement as "inducing" them to restrict

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8/ 47 U.S.C. § 271.

9/ *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, and 98-170, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329, ¶ 70 (released Dec. 13, 2002) (noting policy implications of "a telecommunications marketplace increasingly characterized by new and innovative bundles of intrastate and interstate telecommunications and non-telecommunications products and services, and increased competition between wireline and wireless technology platforms").

10/ *Recommended Decision*, ¶ 54. Notably, as several dissenting members of the Joint Board point out, "it is extremely difficult, if not impossible, to make meaningful rate comparisons among states" even if only *ILECs'* rates are compared. *Id.*, Separate Statement of Commissioner Dunleavy at 1; *see also* Separate Statement of Commissioner Rowe at 18-19. These difficulties are dramatically compounded when attempting to compare between rates of ILECs and competitive ETCs.

ETC service offerings that diverge from the "basic service rate template." For example, to the extent ETCs offer service packages that diverge from the basic template by including features in addition to those included in the basic template, such service packages could reasonably be priced at higher levels that may not comply with the "rate benchmark." Consequently, state commissions might find it difficult to issue the required certification. A requirement that could create incentives to limit the availability of service options to consumers in high-cost areas would harm consumers and disserve the public interest.

B. The Rate Comparability Certification Proposal Violates the Principle of Competitive Neutrality and Fails To Advance the Principles Set Forth in the Act.

The *Recommended Decision*'s rate comparability certification proposal, based on the erroneous assumption that all ETCs are regulated ILECs and that they offer an ILEC-like comparable "basic service rate template" package, violates the principle of competitive neutrality. The Commission, upon the recommendation of the Joint Board, in 1997 exercised its authority under Section 254(b)(7) of the Act to establish "competitive neutrality as a fundamental principle, equal in status to the other principles listed in Section 254(b)." 11/ "Competitive neutrality" is "intended . . . to facilitate a market-based process whereby each user comes to be served by the most efficient technology and carrier," and whereby "no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of

11/ *Universal Service First Report and Order,* 12 FCC Rcd at 8801-03, ¶¶ 46-51.

potential service providers." 12/ Yet by enshrining the standard ILEC local service package – and the traditional ILEC rate structure – as the standard universal service package against which all others must be measured, the *Recommended Decision*'s proposal could make it difficult or impossible for non-traditional carriers' offerings to obtain state certification of "comparability." It also violates competitive neutrality by setting in motion a process that would be structurally biased against competitive ETCs, and that ultimately could have the effect of deterring competitive entry.

Indeed, the *Recommended Decision*'s rate comparability certification proposal, like the FCC decision remanded by the Tenth Circuit, "does not help answer the questions that arise about reasonable comparability." 13/ The statutory term "reasonably comparable" is part of a provision that does not narrowly refer to a "basic service rate template," or even to local telecommunications service, but to "telecommunications and information services, including interexchange services and advanced telecommunications and information services." 14/ Moreover, this provision does not does not require that the prices for *all* of these services will be within a narrow range of comparability with one another; rather, it anticipates that any *particular* set of services in this extremely broad category should be available in

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12/ *Id.* at 8801-02, ¶ 48.

13/ *Qwest Corp. v. FCC*, 258 F.3d at 1201.

14/ 47 U.S.C. § 254(b)(3).

high-cost and rural areas "at rates that are reasonably comparable to rates charged *for similar services* in urban areas." 15/

It makes no sense to compare a mobile wireless ETC's rates for service packages that include local, long-distance, and roaming minutes, with rates for ILEC "basic service rate template" offerings – and such an incongruous rate comparison requirement cannot be read into the statutory language. At most, any rate comparison should be among similar service packages offered. In other words, one could reasonably compare rates for ILEC basic service packages in rural areas to rates for comparable packages elsewhere, or rates for CMRS local-plus-long-distance package plans offered in rural areas to comparable package plans offered elsewhere. But one cannot reasonably compare all ETCs' offerings to a standardized template based on the existing rate levels and rate structures of the ILECs. 16/ Neither the Act nor the Tenth Circuit decision requires such an absurd result.

C. Any Rate Comparability Certification Requirement Should Apply Only to ILECs, Not to Competitive ETCs.

If the Commission were to adopt the *Recommended Decision*'s misguided rate comparability certification proposal, the state certification process should apply *only* to ILECs, and not to competitive ETCs. It would be impractical to

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15/ *Id.* (emphasis added).

16/ The rationale espoused by the *Recommended Decision* to support the 135% national rate benchmark makes little sense. A statistical analysis of the extent to which ILEC rates *currently* diverge, whether based on a "standard deviation" or "cluster" methodology, *see Recommended Decision,* ¶¶ 34-38, says nothing about what degree of rate divergence would satisfy the statutory principle that rates be "reasonably comparable."

require state commissions to issue such a certification with regard to the rates charged by carriers over which they lack rate regulation authority, and such a requirement might be construed as an invitation to improperly impose rate regulation on deregulated carriers such as CMRS providers. As noted above, it would also be impractical to apply such a certification requirement to classes of carriers that offer diverse packages of features and rate structures that frequently differ in fundamental ways from the ILEC-centric comparison-point.

Moreover, and most fundamentally, applying such a certification requirement to competitive ETCs not only would be impractical, but also is *unnecessary* to protect consumers or to effectuate the statutory principles of affordability and rate comparability. There is no need for such certification or any other regulatory measures to ensure that competitive entrants' rates are affordable, comparable, and reasonable. If competitive ETCs were to set rates that were "unaffordable," "non-comparable," or unreasonable, consumers would choose not to sign up for their service offerings. This also means that competitive ETCs would not receive universal service support for offerings with unaffordable or unreasonable rates (which consumers would opt not to purchase), since competitive ETCs receive support only for the customer lines that they provide. In other words, "marketplace forces will operate to ensure that the rates and other tariff provisions

of non-dominant carriers comply with the objectives of Sections 201 and 202 of the Act," including reasonable and non-discriminatory rates. 17/

Application of the certification requirement to ILECs but not to their competitors would be consistent with competitive neutrality, given that ILECs, but not competitive ETCs, possess market power and are subject to state rate regulation. Competitive neutrality clearly does not require that competitive entrants be subjected to "symmetrical" regulatory requirements designed for ILECs with market power. 18/ The Commission's conclusion twenty years ago still rings true today: "we believe that it would defy logic and contradict the evidence available to regulate in an identical manner carriers who differ greatly in terms of their economic resources and market strength." 19/

II. CONSUMERS BENEFIT WHEN STATES ADVANCE UNIVERSAL SERVICE USING COMPETITIVELY NEUTRAL MEANS, RATHER THAN STATEWIDE AVERAGING AND IMPLICIT SUBSIDIES.

The Tenth Circuit held that the Commission "remains obligated to create some inducement . . . for the states to assist in implementing the goals of universal service." 20/ The *Recommended Decision* does not address state universal

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17/ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 FCC 2d 1, 18, ¶ 48 (1980) ("*Competitive Common Carrier*"); *cf.* 47 U.S.C. § 160.

18/ *See Universal Service First Report and Order*, 12 FCC Rcd at 8819-20, ¶ 79 ("[S]tatutory and policy considerations preclude us from imposing 'symmetrical' service obligations on all eligible carriers," such as equal access requirements, because such requirements "would undercut local competition and reduce consumer choice . . . .").

19/ *Competitive Common Carrier*, 85 FCC 2d at 14, ¶ 34.

20/ *Qwest Corp. v. FCC*, 258 F.3d at 1203-04.

service policies such as reliance on the implicit subsidies generated through statewide averaging of large ILECs' rates. 21/ The Commission should work closely with state commissions to move towards eliminating intrastate implicit subsidies and implementing universal service programs in a competitively neutral manner.

Statewide averaging of large ILECs' rates is a form of implicit subsidy. Because such subsidies are unavailable to competitive entrants in rural areas, they patently violate the Act and the principle of competitive neutrality, as the Fifth Circuit has affirmed on several occasions. 22/ Although the Tenth Circuit recognizes that, given the jurisdictional limitations on the FCC's authority over intrastate rates, Section 254 does not "requir[e] the FCC broadly to replace implicit support previously provided by the states with explicit *federal* support," 23/ it also concludes that the Commission may not simply ignore the problem, and must induce states to act. 24/ The Tenth Circuit never purports to disagree with, much less overrule, the Fifth Circuit's determination that implicit subsidies are unlawful and must be eliminated under the Act.

The *Recommended Decision* proposes, in effect, to continue relying on implicit subsidies such as statewide rate averaging. For example, it acknowledges that "[s]tates tend to rely on either implicit or explicit mechanisms to transfer

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21/ *Recommended Decision*, ¶¶ 24, 26.

22/ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 406 (5th Cir. 1999); *Alenco Communications, Inc. v. FCC*, 201 F.3d 608 (5th Cir. 2000); *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313, 318 (5th Cir. 2001).

23/ *Qwest Corp. v. FCC*, 258 F.3d at 1204 (emphasis added).

24/ *Id.*

support from low-cost lines to high-cost lines within a state," 25/ and far from expressing any discomfort with such a policy, indicates continued support for such policies. 26/ The *Recommended Decision*'s approach does not seem to be in concert with the mandates of the Fifth and Tenth Circuits, and with the basic premise for universal service reform:

> The present universal service system is incompatible with the statutory mandate to introduce efficient competition into local markets, because the current system distorts competition in those markets. For example, without universal service reform, facilities-based entrants would be forced to compete against monopoly providers that enjoy not only the technical, economic, and marketing advantages of incumbency, but also subsidies that are provided only to the incumbents. 27/

Rather than approving and continuing to rely on such a monopoly-based policy as statewide rate averaging, the Commission should work with the states to phase out and ultimately eliminate such implicit subsidies. Any and all universal service support must be explicit, portable, and competitively neutral.

Finally, in comments filed before the Joint Board in this proceeding, CUSC argued that the Commission should induce states to employ competitively and technologically neutral rules and procedures for designating eligible participants in state and federal universal service programs. CUSC argued that states should employ ETC designation procedures that do not unduly delay or

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25/ *Recommended Decision*, ¶ 24.

26/ *See, e.g., id.* at ¶ 26.

27/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15506-07, ¶ 5 (1996), *subsequent history omitted.*

thwart competitive entry, and should not impose ETC requirements or conditions that are systematically biased against CMRS providers or other competitive entrants. 28/ CUSC is delighted that the Commission has referred these issues to the Joint Board for further consideration in the forthcoming *Competitive Universal Service* proceeding, and looks forward to continuing to work productively to ensure that both state and federal regulators implement universal service policy in a competitively and technologically neutral manner. 29/

III. THE COMMISSION SHOULD NOT ADOPT AN *AD HOC* PROCESS FOR STATES TO SEEK ADDITIONAL FEDERAL HIGH-COST FUNDS.

The *Recommended Decision* includes a proposal to allow states to make an *ad hoc* case before the FCC for more federal universal service support in the event that "current combined federal and state actions are insufficient to produce reasonably comparable rates." 30/ While the *Recommended Decision* allows the FCC to "consider taking further action to meet the needs of the state in achieving

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28/ CUSC Comments, CC Docket No. 96-45, filed April 10, 2002, at 9-17 ("*CUSC Comments*"). For example, CUSC provided information regarding anti-competitive requirements and conditions imposed by some states, such as: (1) extraordinarily slow procedures employed by some states; (2) duplicative and time-consuming procedures for obtaining designation for purposes of federal and state programs; (3) conditions restricting the rates that CMRS carriers may charge, notwithstanding the Act's prohibition of state rate regulation of CMRS carriers; (4) conditions imposing tariff filing requirements on CMRS carriers; (5) conditions requiring CMRS carriers to offer specified rate structures (*e.g.*, unlimited local usage); and (6) state equal access requirements on CMRS carriers, notwithstanding the statutory ban on such requirements. *Id.*

29/ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC 02-307, ¶¶ 6, 10 (released Nov. 8, 2002).

30/ *Recommended Decision*, ¶ 55(d); *see also id.*, ¶¶ 50 & 56.

reasonably comparable rates" in response to such a showing, 31/ it does not suggest what standard the FCC would use to evaluate the state's showing nor what amount of additional funding would be provided if a state successfully made such a showing.

The Commission should reject this vague recommendation, which does not meet the statutory criterion of providing support that is "predictable." 32/ If the amount of portable funding per-line is not made known in advance, prospective competitive entrants (as well as ILECs) lose any ability to engage in business planning and determine whether or not to enter a given market. Such uncertainty and lack of "transparency" violates competitive neutrality, and in some cases could pose a barrier to entry. 33/ To meet the statutory requirement of being "predictable," and to prevent unreasonable discrimination between similarly situated carriers or geographic areas in different states, the fund must have specified rules in advance.

31/ *Id.*, ¶ 55(d).

32/ 47 U.S.C. § 254(b)(5). *Accord*, *Alenco Communications, Inc. v. FCC*, 201 F.3d at 623 ("the Commission reasonably construed the predictability principle to require only predictable *rules* that govern distribution of the subsidies") (emphasis in original); *Recommended Decision*, Separate Statement of Commissioner Dunleavy at 1-2; Separate Statement of Commissioner Rowe at 16-21.

33/ "[A] new entrant cannot reasonably be expected to be able to make the substantial financial investment required to provide the supported services in high-cost areas without some assurance that it will be eligible for federal universal service support. In fact, the carrier may be unable to secure financing or finalize business plans due to uncertainty . . ." in this regard. *Federal-State Joint Board on Universal Service; Western Wireless Corp. Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, 15 FCC Rcd 15168, 15173, ¶ 13 (2000).

CONCLUSION

For the reasons stated above and in CUSC's initial comments in this proceeding before the Joint Board (filed on April 10, 2002), CUSC respectfully urges the Commission to consider alternative policies that would preserve and advance universal service in a more effective and competitively neutral manner than the *Recommended Decision*'s proposals. If necessary, the Commission should not hesitate to seek further comment, or even to refer the issues back to the Joint Board for further consideration.

Respectfully submitted

COMPETITIVE UNIVERSAL
SERVICE COALITION

By: _____

Michele C. Farquhar
David L. Sieradzki
HOGAN & HARTSON, LLP
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Washington, D.C. 20004
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